

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 2, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2089

Cir. Ct. No. 2010CV2045

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

KENOSHA CEMETERY ASSOCIATION,

PLAINTIFF-RESPONDENT,

V.

JANET DEPAOLI AND JEFFREY DEPAOLI,

DEFENDANTS-APPELLANTS,

INSURANCE CORPORATION OF HANOVER-BER,

DEFENDANT.

APPEAL from a judgment of the circuit court for Kenosha County:
BRUCE E. SCHROEDER, Judge. *Affirmed in part, reversed in part, and cause remanded with directions.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Janet and Jeffrey Depaoli appeal from a monetary damage judgment entered on a civil jury verdict in favor of Kenosha Cemetery Association (KCA). The Depaolis contend that the evidence was insufficient to sustain the verdict against Jeffrey. They further contend that the circuit court erred in its instructions to the jury regarding damages. Finally, they contend that it is a manifest injustice that the monetary judgment against Jeffrey is not “joint and several” with Janet so as to avoid a duplication of damages.

¶2 We conclude that the evidence presented at trial was sufficient to sustain the verdict against Jeffrey. We also conclude that the circuit court did not err in its instructions to the jury regarding damages. However, we agree with the Depaolis that the current judgment reflects an unjust duplication of damages and must be corrected. Accordingly, we affirm in part, reverse in part, and remand the case to the circuit court so that it can modify the judgment in a manner consistent with this opinion.

¶3 KCA operates the Green Ridge Cemetery in Kenosha, Wisconsin. Janet was employed by KCA as its office manager and held the positions of secretary and treasurer. Her husband, Jeffrey, was also employed by KCA as grounds supervisor.

¶4 On December 15, 2006, Janet opened a checking account with Chase Bank in the name of KCA. She was the sole signatory on the account and was issued a debit card with her name embossed on it. This account was never authorized by KCA.

¶5 From the opening of the Chase account on December 15, 2006, until her termination by KCA on July 15, 2009, Janet deposited monies into the account that she received on behalf of KCA totaling \$173,809.23. She used the

bank-issued debit card to make purchases and obtain cash from the account totaling \$154,264.97. She also wrote checks on the account totaling \$19,544.26, of which only \$1500 was to cover KCA expenses. The remainder was for the personal use of her and her husband.

¶6 Prior to Janet's opening of the Chase account, all of KCA's banking accounts had been consolidated at Southport Bank. Between November 17, 2006, and May 15, 2009, Janet also wrote checks on the Southport account that were for her and her husband's personal use and not for KCA purposes. Those checks totaled \$8,218.92.

¶7 Eventually, Peter Johnson, the president of KCA, noticed a significant amount of outstanding bills and directed an outside accountant to investigate. Upon learning of the existence of the Chase account, he removed Janet from all accounts. He subsequently terminated the employment of both Janet and Jeffrey.

¶8 On September 16, 2010, KCA filed a civil action against the Depaolis. The complaint alleged multiple causes of action¹ against Janet for having misappropriated funds from KCA while she worked there as an employee. The complaint also alleged a single cause of action against both Janet and Jeffrey for conversion.

¶9 The case proceeded to a jury trial. After all of the evidence was in, the circuit court voiced concern that the special verdict questions could invite the jury to award duplicate damages. When the court asked KCA how it would

¹ The causes of action were civil theft and breach of a fiduciary duty.

propose dealing with this potential problem, KCA responded that the matter could be addressed after the verdict.

¶10 During deliberations, the jury sent out a question asking whether the amounts that it assigned to each cause of action were cumulative. The circuit court responded with the following instruction:

You are to award any amount which is a consequence of any tort you have found to have been committed, I will then use your award to structure the judgment according to law.

Do not concern yourselves if there is any duplication in the amounts that you award, if any, as to each question. I will resolve that issue.

¶11 Shortly thereafter, the jury returned its verdict in favor of KCA. They found Jeffrey and Janet liable on all counts in the amounts of \$90,250 and \$240,500, respectively.² Following a postjudgment motion hearing, the circuit court entered judgment on the verdict. This appeal follows.

¶12 On appeal, the Depaolis first contend that the evidence was insufficient to sustain the verdict against Jeffrey. Although they acknowledge that Jeffrey received some funds from Janet's actions that were not authorized by KCA, they dispute that it was for the amount reflected in the jury's verdict.

¶13 Appellate review of a jury's verdict is limited and narrow. *Hoffmann v. Wisconsin Electric Power Co.*, 2003 WI 64, ¶9, 262 Wis. 2d 264, 664 N.W.2d 55. We must view the evidence in the light most favorable to the jury's verdict and sustain the verdict if there is any credible evidence to support it,

² These amounts exclude fees and costs. The jury's award against Janet includes \$60,000 in compensation for KCA's investigation and litigation. The parties do not dispute this figure, and we will not discuss it further.

regardless of whether there is evidence to support a different verdict. *Id.* We will not upset the verdict unless there is such a complete failure of proof that the verdict must have been based on speculation. *Id.*

¶14 At trial, KCA provided witness testimony and documentary evidence regarding the losses it suffered due to the actions of Janet and Jeffrey, which totaled approximately \$240,500. Some of those funds were diverted to Jeffrey directly. However, most of the funds were used for payments of household expenses from which he benefitted indirectly. Whether direct or indirect, Jeffrey's use of the funds was an intentional conversion of KCA's monies without lawful authority. Viewing the evidence provided by KCA in a light most favorable to the jury's verdict, we are satisfied that the jury, acting reasonably, could find Jeffrey liable in the amount of \$90,250.

¶15 The Depaolis next contend that the circuit court erred in its instructions to the jury regarding damages. Specifically, they complain that the court's instruction impermissibly lowered KCA's burden of proof to show damages for each cause of action.

¶16 The circuit court has broad discretion in its instructions to a jury. *K & S Tool & Die Corp. v. Perfection Mach. Sales, Inc.*, 2006 WI App 148, ¶33, 295 Wis. 2d 298, 720 N.W.2d 507. That discretion extends to questions from the jury during deliberations. *See State v. Simplot*, 180 Wis. 2d 383, 404, 509 N.W.2d 338 (Ct. App. 1993). When a question is received from the jury, the court is to "respond ... with sufficient specificity to clarify the jury's problem." *Id.* at 405 (quoting *State v. Booth*, 147 Wis. 2d 208, 212-13, 432 N.W.2d 681 (Ct. App. 1988)).

¶17 Here, the circuit court responded to the jury's question about cumulative damages by instructing it to "award any amount which is a consequence of any tort you have found to have been committed" and "not concern yourselves if there is any duplication in the amounts that you award." We are not persuaded that this instruction was erroneous or improperly relieved KCA of its burden to show damages for each cause of action. The fact that the damages were the same for the causes of action asserted against Janet is not surprising given that they arose out of the same set of facts and resulted in the same harm to KCA.³

¶18 Finally, the Depaolis contend that it is a manifest injustice that the monetary judgment against Jeffrey is not "joint and several" with Janet so as to avoid a duplication of damages. They ask that the case be remanded so that the judgment can be modified.

¶19 On this final issue, we agree with the Depaolis that the current judgment reflects an unjust duplication of damages. Under the judgment, KCA has the right to collect \$240,500 from Janet and \$90,250 from Jeffrey for a total of \$330,750. This exceeds, by \$90,250, the amount of damages KCA could reasonably argue were proven on the record. In the interest of justice, we will reverse and remand the matter to the circuit court so that it can enter an amended judgment.

³ In its verdict, the jury found Janet liable for civil theft, conversion, and breach of a fiduciary duty. For each one of these torts, the jury wrote in the figure of \$180,500 as the sum of money that would reasonably compensate KCA.

¶20 Because the Depaolis acted in accordance with a common scheme or plan that resulted in KCA's damages, they should be held jointly and severally responsible. *See* WIS. STAT. § 895.045(2) (2011-12).⁴ Accordingly, on remand, the circuit court shall modify the judgment so that the \$90,250 award against Jeffrey is joint and several with Janet and that the \$240,500 award against Janet is joint and several with Jeffrey. Excluding fees and costs, KCA is not to collect more than \$240,500 in total judgment.

By the Court.—Judgment affirmed in part, reversed in part, and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

⁴ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

